

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

---

In re:

Chapter 7

Ronald R. Rogers,

BKY Case No.: 03-46970

Debtor.

---

**VERIFIED NOTICE OF HEARING AND MOTION OBJECTING TO  
CLAIMED EXEMPT PROPERTY**

TO: THE UNITED STATES BANKRUPTCY COURT, THE UNITED STATES TRUSTEE,  
THE DEBTOR, THE DEBTOR'S ATTORNEY, AND ALL PARTIES WHO REQUESTED  
NOTICE UNDER BANKRUPTCY RULE 2002:

1. Brian F. Leonard, Trustee herein, moves the Court for the relief requested below, and gives notice of hearing herewith.

2. The Court has jurisdiction over this motion pursuant to 28 U.S.C. § § 157 and 1334, Bankruptcy Rule 5005, and Local Rule 1071-1. This motion is filed pursuant to Bankruptcy Rule 9014 and Local Rules 9013-1 through 9013-5. This proceeding arises under 11 U.S.C. § 522 and Local Rule 4003-1(a).

3. The Court will hold a hearing on this objection on December 11, 2003, at 11:00 a.m. in Courtroom 7 West, U.S. Courthouse, 300 South Fourth Street, Minneapolis, MN 55415, or as soon thereafter as counsel can be heard.

4. Any entity opposing the motion under Local Rule 9013-2 is required to file and serve a response, including a memorandum of facts and law and any opposing affidavit, not later than December 8, 2003, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than December 2, 2003, which is seven days before the time set for the hearing (excluding Saturdays, Sundays, and holidays). **If no response is timely served and filed, the Court may grant the relief requested without a hearing.**

5. The undersigned trustee hereby objects to the debtor's claim that the following property is exempt under the applicable exemption statute: Two retirement accounts, listed as:

401(k)	listed value: \$30,000.00	value claimed exempt:	\$30,000.00
SEP IRA	listed value: \$66,005.92	valued claimed exempt:	\$66,005.92

6. The objection is made for the following reason: Debtor claimed the SEP IRA account exempt under Minn. Stat. § 550.37, Subd. 24. The SEP IRA is not exempt under § 550.37 Subd. 24 because it is not payable on account of illness, disability, death, age or length or service.

This court has held that to qualify for exemption under subdivision 24, a plan must meet there criteria: (1) Debtor must have the right to receive payments under a stock bonus, pension, profit sharing, annuity, individual retirement, individual retirement annuity, simplified employee pension, or similar plan; (2) Debtor's right to payment must be on account of illness, disability, death, age or length of service; and, (3) Debtor's aggregate interest under all such plans and contracts must have a present value of no more than [\$54,000.00]. *In re Jenkins*, 2003 W.L. 22423164 (Bank. D. Minn. 2003) (copy attached).

In addressing the exemption of an IRA under 11 U.S.C. § 552(d)(10)(E), the Eighth Circuit Bankruptcy Appellate Panel held that payments “are exempt only if they (1) are received pursuant to a pension, annuity, or similar plan or contract; (2) are on account of illness, disability, death, age, or length of service; (3) are reasonably necessary for the Debtor’s support or the support of a dependent of the Debtor,” and, that the plan must meet all three requirements. *In re Rousey*, 283 B.R. 265, 269 (8<sup>th</sup> Cir. BAP, 2002). In *Rousey*, Debtors argued that the fact there would be tax penalties for early withdrawal of the IRA funds amounted to a restriction on access, but the BAP found that the Debtor still had unfettered discretion to withdraw the funds. *Rousey*, 283 B.R. at 272.

In applying the same language under the Iowa exemption statute, Iowa Code § 627.6(8)(e), the 8<sup>th</sup> Circuit Court of Appeals likewise held that the unfettered ability to withdraw money from an annuity or plan means that the rights to payment are not “on account of illness, disability, death, age, or length of service,” disqualifying the IRA from exemption. *See, In re Elibert*, 162 F.3d. 523, 527-528 (8<sup>th</sup> Cir. 1998), *In re Huebner*, 986 F.2d. 1222, 1224-1225 (8<sup>th</sup> Cir. 1993), cert. denied, 510 U.S. 900, 114 S.Ct. 272 (1993).

Accordingly, where, as here, the manner in which funds are held in a SEP IRA allow the Debtor to withdraw the funds, without restriction other than early withdrawal tax penalties or brokerage fees, the Debtor’s right to payment under the SEP IRA is not on account of illness, disability, death, age, or length of service and the SEP IRA do not qualify for exemption under Minn. Stat. §550.37, subd. 24.

The Trustee objects to the 401(k) exemption in order to protect his rights while he reviews the Debtor’s records with respect to the same.

**LEONARD, O’BRIEN  
SPENCER, GALE & SAYRE, LTD.**

/e/ Matthew R. Burton

Dated: November 18, 2003

By \_\_\_\_\_  
Matthew R. Burton, #210018  
Attorneys for Chapter 7 Trustee  
100 South Fifth Street  
Suite 1200  
Minneapolis, Minnesota 55402-1216  
(612) 332-1030

## **VERIFICATION**

Brian F. Leonard, being duly sworn says that he is the Chapter 7 Trustee in this action, that he has read this Verified Notice and Objection to Claimed Exempt Property and that it is true of his own knowledge, to the best of his information.

/s/ Brian F. Leonard

---

Brian F. Leonard

@PFDesktop\.:ODMA/GRPWISE/GWDMPLS.GWPOMPLS.MPLSLIB1:112601.1



**In re Jenkins**  
2003 WL 22423164  
Bkrtcy.D.Minn., 2003.  
Oct. 24, 2003. (Approx. 3 pages)

---



--- B.R. ---

Only the Westlaw citation is currently available.

Chapter 7 trustee objected to Minnesota state law exemption claimed by debtor for her right to receive payment under individual retirement accounts (IRAs). The Bankruptcy Court, Robert J. Kressel, J., held that, where debtor conceded that her IRAs were strictly investment accounts, to which she had immediate access, her right to payment under IRAs was not "on account of illness, disability, death, age or length of service," as required for debtor to exempt her interest in IRAs under Minnesota law.

Objection sustained.

[1]

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k37 k. Specific Exemptions in General. Most Cited Cases

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k49 k. Pension Money. Most Cited Cases

Three requirements must be satisfied in order for debtor's right to receive certain payments to be exempt under Minnesota exemption for debtor's right to receive payments under a stock bonus, pension, profit sharing, annuity, individual retirement account (IRA), or other such plan or contract: (1) debtor must have right to receive payments under such a plan or contract; (2) debtor's right to payment must be on account of illness, disability, death, age or length of service; and (3) debtor's aggregate interest under all such plans and contracts must have present value of no more than \$54,000. M.S.A. § 550.37, subd. 24.

[2]

163 Exemptions

163I Nature and Extent

163I(C) Property and Rights Exempt

163k49 k. Pension Money. Most Cited Cases

Where Chapter 7 debtor conceded that her individual retirement accounts (IRAs) were strictly investment accounts, to which she had immediate access, her right to payment under IRAs was not "on account of illness, disability, death, age or length of service," as required for debtor to exempt her interest in IRAs under governing Minnesota exemption statute. M.S.A. § 550.37, subd. 24. Julia A. Christians, Lapp, Libra, Thomson, Stoebner & Pusch, Chartered, Minneapolis, MN, Trustee. David R. Forro, Caldecott & Forro, Minneapolis, MN, for Debtor.

MEMORANDUM ORDER DISALLOWING EXEMPTIONS

ROBERT J. KRESSEL, Bankruptcy Judge.

\*1 This case came before the court on October 22, 2003, on the motion of the trustee, Julia A. Christians, objecting to the debtor's claim of exemption of three IRA accounts. The trustee appeared *in propria persona*. David R. Forro appeared on behalf of the debtor. This court has jurisdiction over this matter pursuant to 28 U.S.C. § 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1071-1.

This is a core proceeding.

#### BACKGROUND

The parties agree to the following undisputed facts: On August 13, 2003, the debtor filed a Chapter 7 bankruptcy petition. Pursuant to 11 U.S.C. § 522(b)(2)(A), the debtor chose to **exempt** property, including three individual retirement accounts, under the laws of the state of Minnesota. As of June 30, 2003, the three accounts were valued as follows: (1) Schwab, **SEP-IRA** \$2,268.87; (2) RBC Dain Rauscher, **Roth IRA** \$2,199.81; (3) RBC Dain Rauscher, **IRA** \$1,763. The amounts listed in the debtor's Schedules are different, but the debtor concedes that all three IRAs are strictly investment accounts to which she has immediate access. For purposes of this case, the exact dollar amount of the IRAs is not important because the IRA totals are well below the dollar limit imposed by the Minnesota Statute.

The trustee objects to the debtor's claimed IRA exemptions. The parties agree that the issue regarding the exemption of the IRAs is strictly one of law and that no further evidence is needed to resolve the issue. Because I agree with the trustee, I conclude that the debtor's IRAs are not exempt.

#### DISCUSSION

[1][2] Minn.Stat. § 550.37, Subd. 24 exempts:

(a) The debtor's right to receive present or future payments, or payments received by the debtor, under a stock bonus, pension, profit sharing, annuity, individual retirement account, Roth IRA, individual retirement annuity, simplified employee pension, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent of the debtor's aggregate interest under all plans and contracts up to a present value of \$30,000 [\$54,000 currently per indexing] and additional amounts under all the plans and contracts to the extent reasonably necessary for the support of the debtor and any spouse or dependent of the debtor.

(b) The exemptions in paragraph (a) do not apply when the debt is owed under a support order as defined in section 518.54, subdivision 4a.

Thus, to qualify for the exemption under subdivision 24, a plan must meet three criteria: (1) the debtor must have the right to receive payments under a stock bonus, pension, profit sharing, annuity, individual retirement account, Roth IRA, individual retirement annuity, simplified employee pension or similar plan; (2) the debtor's right to payment must be on account of illness, disability, death, age or length of service; and (3) the debtor's aggregate interest under all such plans and contracts must have a present value of no more than [\$54,000]. See *In re Gagne*, 166 B.R. 362, 363 (Bankr.D.Minn.1993) *aff'd* in relevant part, *Gagne v. Bergquist*, 179 B.R. 884 (D.Minn.1994).

\*2 In this case, the debtor's IRAs meet the first and third requirements, but not the second. The debtor is free to withdraw the balance in her IRA accounts at any time, subject only to certain charges for early withdrawal. See *In re Raymond*, 71 B.R. 628, 630 (Bankr.D.Minn.1987) (stating that the annuity in question is not payable "on account of illness, disability, death, age, or length of service" under § 550.37, subd. 24 because there are no restrictions on its transferability). In *In re Rousey*, the Eighth Circuit Bankruptcy Appellate Panel addressed the application of 11 U.S.C. § 522 (d)(10)(E), which has language that is similar to that of Minn.Stat. § 550.37, Subd. 24, and held that in order to qualify as exempt, the payments in question must be: (1) received pursuant to a pension, annuity, or similar plan or contract; (2) on account of illness, disability, death, age, or length of service; (3) reasonably necessary for the debtor's support or for the support of a dependent of the debtor. *Rousey v. Jacoway (In re Rousey)*, 283 B.R. 265, 269 (8th Cir. BAP 2002), *aff'd*, --- F.3d ---, 2003 WL 22382955 (8th Cir. Oct.20, 2003) (emphasis added). Moreover, to qualify for exemption, the plan must meet all three statutory requirements. *Id.* The Eighth Circuit Court of Appeals, in applying identical language under the Iowa exemption statute, held that the unfettered ability to withdraw money from any annuity or plan makes the rights to payment not "on account of illness, disability, death, age or length of service" and thus disqualifies the plan or annuity from exemption. See *Eilbert v. Pelican (In re Eilbert)*, 162 F.3d 523, 527-528 (8th Cir.1998); *Huebner v. Farmers State Bank, Grafton, Iowa (In re Huebner)*, 986 F.2d 1222, 1224-1225 (8th Cir.1993), *cert. denied*, 510 U.S. 900, 114 S.Ct. 272, 126 L.Ed.2d 223 (1993).

The debtor has unfettered access to the IRA accounts in dispute, and therefore such accounts are not payable "on account of illness, disability, death, age, or length of service." Since the debtor's IRA accounts here do not meet the second requirement of Minn.Stat. § 550.37, Subd. 24, the IRAs are not exempt.

The debtor argues that a finding that her IRAs are not exempt would nullify the state legislature's expressed intent to provide protection to a debtor's retirement savings in IRAs. I disagree. While

some IRAs are exempt, not all are, just as some pension plans are exempt and some are not. The Minnesota Legislature added the requirement that payments under the plan be on account of at least one of the denominated factors. The debtor's argument is essentially that all IRAs are per se exempt, subject only to the dollar limitations. This is obviously inconsistent with the way the statute is written. If the legislature intended all IRAs to be exempt it would have been easy enough to say that.

Finally, the debtor argues that because the Minnesota Supreme Court in *Estate of Emlyn Jones v. Kvamme*, 529 N.W.2d 335 (Minn.1995), examined the predecessor statute to Minn.Stat. § 550.37, Subd. 24 in the context of its constitutionality under the Minnesota Constitution, I am bound by certain language in that case regarding the exemption of IRAs. I disagree. The Minnesota Supreme Court, in that case, held that because an earlier version of Minn.Stat. § 550.37, Subd. 24(1) contained no limit on the amount that may be accumulated in an IRA, the clause violated Minn. Const. Art. I, § 12. [FN1] *Id.* at 338. In dictum, the Minnesota Supreme Court went on to state: \*3 Our holding today means that plans governed by ERISA will continue to be entirely exempt, whereas plans not covered by ERISA, like an IRA, will only be exempt up to an indexed \$30,000, plus an amount reasonably necessary for the support of the debtor and the debtor's spouse or dependents.

*Id.* at 339. Read in isolation, this language appears to support the debtor. However, the court was not addressing the issue in this case and discussed IRAs in only the most general of terms. The Minnesota Supreme Court did not discuss whether IRAs were exempt "on account of illness, disability, death, age, or length of service." The Court merely acknowledged the different treatment of ERISA plans and non-ERISA plans when determining the amount exempted under the Minnesota exemption statute.

ORDER

THEREFORE IT IS ORDERED:

The debtor's **SEP-IRA** account held at Schwab and her two IRA accounts at RBC Dain Rauscher are not **exempt**.

FN1. Section 12 provides in part: "A *reasonable* amount of property shall be exempt from seizure or sale for the payment of any debt or liability..." Minn. Const. Art. I, § 12 (emphasis added).

Bkrtcy.D.Minn.,2003.  
In re Jenkins  
2003 WL 22423164 (Bankr.D.Minn.)  
END OF DOCUMENT

Copr. (C) West 2003 No Claim to Orig. U.S. Govt. Works



UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

---

In re:

Chapter 7

Ronald R. Rogers,

BKY Case No.: 03-46970

Debtor.

---

**UNSWORN CERTIFICATE OF SERVICE**

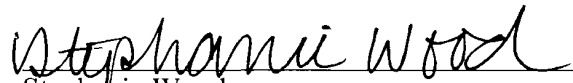
I, Stephanie Wood, declare under penalty of perjury that on the 18th day of November, 2003, I mailed a copy of the annexed *Verified Notice of Hearing and Motion Objecting to Claimed Exempt Property and Order Respecting Objection to Claim of Exemption (proposed)* on:

Mr. Thomas J. Flynn  
Larkin Hoffman  
1500 Wells Fargo Plaza  
7900 Xerxes Ave. S.  
Minneapolis, MN 55431

US Trustee  
1015 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55402

by mailing to all parties copies thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the post office at Minneapolis, Minnesota, directed to said party at the last known addresses of said parties.

Dated: November 18, 2003

  
Stephanie Wood  
100 South Fifth Street, Suite 1200  
Minneapolis, MN 55402  
(612) 332-1030

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

---

In re:

Chapter 7

Ronald R. Rogers,

BKY Case No.: 03-46970

Debtor.

---

**ORDER RESPECTING OBJECTION TO CLAIM OF EXEMPTION**

The objection of the trustee to the Debtor's claim that the following property is exempt under Minn. Stat. § 550.37, Subd. 24, SEP IRA, listed value: \$66,005.92; 401(k), listed value: \$30,000.00, came on for hearing on December 11, 2003.

Appearances were as noted in the record.

Upon said objection and for cause shown, and upon all the files, records, and proceedings herein,

IT IS ORDERED,

That the debtor's claim of exemption in each the SEP IRA account and the 401(k) account are denied.

Dated: \_\_\_\_\_

---

The Honorable Nancy C. Dreher  
United States Bankruptcy Judge